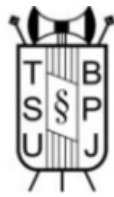


## **“JUDGES ARE JUST LIKE ALL OTHER PEOPLE”**

*An interview with Mark Atkinson*



Mark Atkinson started his career as an attorney specializing in criminal, family and civil trial practice. In 1986, he was elected Presiding Judge for Harris County Criminal Court at Law No. 13.

Judge Atkinson has organized and held lectures and discussions for judges on topics such as: handling family violence cases together with the cultural and ethnic diversity issues which they encompass, criminal court docket management, sentencing and supervising criminal offenders, and maintaining dignity and control in the courtroom. He has not only begun a special program for sentencing repeat driving-while-intoxicated offenders, which successfully lent itself to application in drug cases but also developed a creative structure for handling the delicate matter of young people trespassing the law.

His work on numerous fields connected with the probation service has been widely recognized and acknowledged. So far, he has been honored with several awards: the Mexican-American Bar Association Amicus Award and Houston Council on Alcoholism and Drug Abuse Judicial Award, to name but few.

He was also made Judge of the Year by Houston Police Officers Association. Judge Atkinson has been to Poland twice, in 2006 and 2008, as an expert guest of the Public Affairs Sections of the U.S. Embassy in Warsaw and Consulate General in Cracow. During the second stay, he also visited the Jagiellonian University and the American Law School at Larish Palace, where he held a lecture on various aspects of structured sentencing and the functioning of the county court. The discussion that followed and long outgrew the prescribed time focused on the efficiency of creative sentencing, judges' election campaign

and their independence while holding the office as well as training of people working in the penitentiary service.

Despite the tight schedule, Judge Atkinson agreed to take part in an interview for ALP, for which I am very grateful as it allowed us to get a true glimpse at the functioning of the US justice system from behind the curtain.

**Joanna Śliwa:** *I know you are a great supporter of the jury system. What is it about the jury that makes it so popular both with the judges and the American law professors? Am I mistaken in saying that the jury trial is not all together a truth-finding process but gives the lawyer an opportunity to make the jury see exactly what the lawyer needs them to see in order to win the case?*

**Mark Atkinson:** I’m not purporting that every country in the world should adopt the jury but I must admit I like it a lot. I’m confident about the ability of a human being to make rational decisions. People who sit on the jury panel are, actually, much more sophisticated and cleverer than we tend to think. Of course, this is not to say that every jury verdict is bound to be one hundred percent right but neither are the judges’ decisions! The jury possesses an element of what I’d call common sense analysis, even when the case needs to be decided on a hyper-technical basis. Moreover, they bring a wave of democracy to the court. The latter is decidedly needed, as people in high institutions often consider themselves better, in a way, than everyone else and this is certainly not the idea on which the United States were supposed to be built. We believed that everybody has a brain that they can use, both in their lives and in the jury box.

From what I’ve observed, those who get selected for the jury usually give the job much effort and attention and are really concerned with arriving at the right decisions. The fact that you are an expert in, say, financial matters, does not necessarily mean that you are going to be fair.

**JŚ:** *And would you consider the cross-examination system fair?*

**MA:** We have a lot of leeway about that. If it is a case with an expert witness, the other side’s expert is allowed to be present, ask questions and respond to the answers; one may resort to treatises and books. The lawyers are allowed to ask leading questions but the judge is always there to block the answer, if it is to be information unfit for the jury. In civil cases, the members of the jury get to write their own questions which may then be asked at trial. Hence, I really do think the system is pretty efficient.<sup>1</sup>

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<sup>1</sup> For comparison, see: discussion on the jury institution with Louis Barracato ( *Gold E. Locks not guilty! An interview with Louis Barracato*, p. 9-12).

**JŚ:** *Leaving the jury trial and coming to your visits to Poland – you were here in 2006. What was the purpose of that stay?*

**MA:** I was on a delegation that met with people who work in the probation region based in Poznań. The delegation also went to Gdańsk and Mielno to participate in conferences and meetings with judges and probation officers. At first, I thought I was invited because of my brilliant knowledge but soon I was proved wrong! (*Laughter*) From what I saw, Poland is doing really great in this specific area, the probation service being in a really good shape. I actually learned a lot just by sitting quietly and listening to the discussions. During this stay, I'm attending a similar conference that is to take place in Piła.

**JŚ:** *Is it possible to compare the probation systems in Poland and the USA? Are there any common spots?*

**MA:** The probation officers both here and there are very professional and they have the same goals, mainly, rehabilitating people who can be rehabilitated and punishing those who need to be punished. We, however, have some significant differences between the country and particular regions, which, I believe, is not the case in Poland.

**JŚ:** *I read that, back at home, you hold lectures for judges on various topics. Are judges willing to learn at all? Can they stand anyone telling them how to do their job?*

**MA:** A very good question but the answer is pretty simple. Judges, at least those elected, are just like all other people: some of them think they know everything and that they don't need to do anything more; some sit in the back row and read the newspaper or sleep. But by far, most of them are eager to learn something new. They go to the conferences and educational seminars and try to find something that they can take with them to their courts to solve a practical problem they happen to encounter.

**JŚ:** *You also conduct classes on caseload and docket management. I suppose this is connected with the great number of cases that arise and how to effectively deal with them?*

**MA:** Exactly. It's all about how to process a whole lot of cases and make good, informed decisions. This is not only the problem of big institutions – also smaller counties in Texas sometimes can't cope because they have too many cases and they're not prosecuting them fast enough. That's essentially what case management is about – how to dispose of cases in a good and timely manner, how to make justice quick but not unjust. From the practical standpoint, this has much to do with the supply of information to the decision makers. Therefore, we are now building up an information system which al-

allows all participants to access each other's database and discuss them via computers. Considering the importance of this issue we actually have people to do just that: court managers.

**JŚ:** *Still, in the case of a civil procedure, it may take up to several years to have your case heard and then the trial itself can also be dragged out. This is bad enough but usually people's freedom and lives are not involved. In criminal cases, however, there's the unmistakable Constitutional right to a speedy trial. Is it really possible to enforce it nowadays?*

**MA:** When I started working, there were some criminal cases lingering for about a year and a half. Now, if I have a case that's six months old before it gets to the jury trial, I start getting nervous. I think one may honestly say that the situation is being systematically improved. Civil cases depend much on jurisdiction and vary greatly with respect to it. The other thing here is also the fact that, being locked up in civil procedure makes people resort to arbitration and mediation as alternative solutions. Subsequently, the judges who eventually do not want to lose their jobs, start to ponder on what may be changed to improve the system. This way it's all getting faster.

**JŚ:** *You are the author of the DWI – a type of a creative sentencing program involving repeat driving-while-intoxicated offenders. What are the program's main components?*

**MA:** The thing that makes it different from other forms of punishment is that those who undertake to go through the program must be prepared to change their whole lifestyle as opposed to its one element. This makes it more troublesome but at the same time it provides far more deeply-reaching effects. The character of the applied sanctions is combined; we use prison time as well as a series of ninety AA meetings, regular drug and alcohol evaluation and treatment, attendance at meetings of survivors of people killed by drunk drivers, loss of driving privileges and community service hours. Subsequent driving permission is dependent upon installing a special device which requires an alcohol check before each starting of the engine, and forwards the results to the supervising judge. On top of all this, “the patient” has to report to the judge once a month, in the early morning hours in order to look him in the eye and describe the treatment's progress.

**JŚ:** *The program started in the 1980s, and was considered at that time very controversial and got much attention in the press. Despite that fact, it has been working ever since. Have many people signed up for it?*

**MA:** Yes, but one has to remember that it is a very individual matter which depends on the person's choice. My prerogative with DWI is to have a lesser amount of accidents due to drunken driving, whatever it takes to achieve that effect. If this means more jail

time for some people – fine. If they want to do this special kind of probation with a lot of changes in their lives and some more help from the outside – the DWI is there for them. I let them pick because I'm aware of the fact that different things may help different people. Actually, now the program has been expanded and a concept called "drug courts" has recently been introduced. Additionally, some things which have been created earlier are being systematized. DWI certainly does have many requirements and the sentencing is very complicated. That's why people often say: "That's just too much for me; I'd rather take the jail." But, once the program got off by starting to show effects and there were less intoxicated drivers who took DWI returning to their bad habits, it became quite popular.

**JŚ:** *But initially, what exactly did people have against it? Was it the fact that its functioning required a lot of funds?*

**MA:** The biggest problem was the lack of understanding of what really the program was. People thought of it as just a "slap on the wrist" for the offenders – that's a saying meaning: barely punished. They didn't realize that, actually, I was making them go back to jail for some time and that, additionally, they were made to do a couple of other things as well. The moment the society had realized it is not about letting the offenders go unpunished or giving them another free chance, the reception immediately improved and people became supportive.

**JŚ:** *Is there any kind of a similar, special creative sentencing program for the young offenders?*

**MA:** Just to make it clear, in Texas, for the criminal procedure reason, you're an adult at the age of seventeen, although you cannot validly enter a contract until you have reached eighteen years of age.

When I'm dealing with young people, I generally want to involve the family as soon as possible. This comes partially from the fact that I, myself, have brought up four sons and understand how a child's behavior affects the whole family. In trying to figure out what I can do to make this young offender decide: "I've done this for the first and last time in my life.", I need to arrive at some significant solutions. I think it's important, if the youngsters live with their parents, that the mother and father come to court and the young offender can see that his deed has greatly hurt and upset them. With a bit of luck, he starts to wonder how could it ever be fair to do this to them, while they're working their heads off trying to get the bills paid. The problem is, most seventeen-year-olds don't think this way. I tend to ask them: "When you shoplifted all those clothes, were you thinking about your mum and dad? No? Well, you might start thinking about them now, because they're certainly not going to be happy when they get a phone call about their son being in county jail. Do you think your mother cried when she got to know? Of

course she did. You might want to think about that, too. Do your parents feed you? Buy you clothes? Put a roof over your head? Then how could you possibly do that to them? How do you feel about what you did to your parents? Horrible? Have you told them that? Turn around, look them in the eye and tell them here, right now."

And they really do it. They talk back and forth in court, which has a surprisingly strong, purifying effect. At least the young person is not walking out of this mess, as if nobody knew about it or as if nothing has happened. When the young ones start to cry themselves, I feel there's a good chance for them to come straight and that I've achieved some success. Pray, they won't commit a crime again.

**JŚ:** *Do you get to put all that into practice often?*

**MA:** I do it every day!

**JŚ:** *I'm sure this works in a great number of cases but let's not deceive ourselves; some offenders need more... persuasion. How do you know that it's the time to apply stricter forms of punishment?*

**MA:** There are a couple of things that make particularly those people different. To begin with, they usually have a prior criminal history, the nature of which being as important as the time of the offence. Additionally, one has to consider how serious is the crime committed on the spot. After analyzing these, I might say that I don't care if someone is eighteen or not, what has been done is so bad, it deserves a regular punishment, also for the community's benefit. People should notice that such crimes don't go unpunished. Let's say, someone repeatedly sells drugs at school; he already got caught as a juvenile at sixteen, then seventeen, now he is eighteen and still does the very same thing. At some point, I might not care anymore about putting him on probation. Obviously, his behavior hadn't changed so it's time to try something different in order to put him to rights and this thing is jail. Even if I want to do a supervised sentence, I send him to jail all the same.

**JŚ:** *Are there any golden rules for structuring the sentence? I read that the USA has Federal Sentencing Guidelines but now, after their mandatory status was said to violate the Sixth Amendment, it's not obligatory to apply them, neither on federal nor state level.*

**MA:** Exactly. Those rules do not bind my court. All that we have are rates of punishment for each crime. Sometimes, the legislator is more specific and stipulates that, if it is a repeated event, there's a minimum mandatory jail time that you can't go below but that's all.

**JŚ:** *So, you actually do it almost all by yourself in each case...*

**MA:** I do. It's not like that in every state, though. Some legislations outline explicitly what the punishment must be. I've talked to the judges who didn't like the particular arrangements for a number of crimes. In those situations, after it had been established that the culprit committed the offences, the probation department had to figure out what the exact nature of the punishment will be.

**JS:** *From what I have found out, the most effective punishment is a combined one, which starts with the harsh elements and then moves on to milder means. What are the specific components of such a model sentence?*

**MA:** If you're doing a supervised sentence, in essence, it's going to be stretched over a period of time and it must work as a continuum of sanctions divided in sections. I strongly believe in placing the most serious parts of the punishment upfront. After this is finished, the person will, or will not, know how bad he has behaved. I should also say something for rewarding success, because people don't just respond to punishments, they respond to rewards, too. So, if you start off with the toughest stuff and the culprit has succeeded with respect to the test that you've assigned him, the sentence should be getting a little less restrictive, in order to show that you are awarding good behavior. If he fails the test, you might tighten the probation back up and use the tough means again, to let him know that this is serious. Afterwards, you may lighten it up once more. It's a process; the line goes up and down. If they succeed all the way – it's over, if not – the probation may be finished and then it's just jail time left.

**JS:** *What about the three major theories of punishment, the individual approach, the benefit of the society in general and the importance of the punishment itself? How should those be combined? Which of those would you name the most important one?*

**MA:** I try to weigh them all in my mind when I'm structuring a sentence. The specific terms, the general terms, rehabilitation and punishment for its own sake should all make sense conceptually. I think that specific means are the easiest to figure out – what does it take for this person not to commit a crime again. It's not as if success was guaranteed on this field but you may at least target. Punishing because something is bad enough that it needs to be punished or because of the repeated conduct – you may figure that out, too. The same with rehabilitation. The one that is really tough is general deterrence. You need to be aware of, e.g. what particularly outrages the society although you are not able to measure it; you are only able to say what should possibly be done, viewing the society in general. To use an example, is probation as a future punishment enough to prevent a juvenile from stealing a car? I don't know. Sometimes, if we decide on all the supervised sentences and no one really gets punished for anything that happens, even for robbery, you may lose the general component, meaning deterring other people from doing the same act.

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**JŚ:** *You are a chair of the American Parole Association which deals with probation and parole service. What does your job there look like?*

**MA:** The organization is of a national scope and mostly made up of probation officers. One of its committees is a judicial one and that's where I work. We organize conferences for the judges to discuss how to deal with probation issues which have actually arose in different parts of the country. We all learn by exchanging experience.

**JŚ:** *What about the organization of the pre-trial service in the States? Is it nationally-based, too?*

**MA:** It's both federal and local. I'll try to explain how it works with the help of the debatable concept of a bond.

Traditionally, a bond in the US is the money you need to pay when you've been charged with a crime and you want to get out of jail before your case has been heard. Let's say that the bond has been set at two thousand dollars, someone pays the bondsman two hundred dollars and promises the bondsman will get the rest in the form of property if a particular person doesn't show up in court. In such a situation, usually the person is let out until the day of the trial. A pre-trial worker appears at an early stage and advises the judge on whether a person is good enough to risk dismissing him from supervision, pending his case coming to trial. Basically, pre-trial service gathers information so that a judge can make well-informed decisions. That information comes in handy not only with the bond question but also later on, when a person is already on probation. It's all mostly about getting people out of jail if they don't really need to be there, provided they don't pose a threat to the society. Being a pre-trial officer is quite a responsible job, involving supervision and direct work with the offenders.

**JŚ:** *Could you tell us something more about the Harris County itself? What's it like from the judge's point of view?*

**MA:** It's a really big area with 6 million people, Houston being the biggest part of it and home to 4 million. There's certainly crime but I don't think it's worse than other places, in fact I think it's better than many. We've had some interesting experience during the city relocation due to the hurricane. It was then possible to compare slightly different approaches to law enforcement in Houston and Los Angeles. The inhabitants of the latter were surprised at the pace within which you might get caught in Houston and at the stricter punishments, once you committed a crime. So, in the aggregate, I think it feels pretty safe here. At least I don't have to lock my door – during the day of course!

**JŚ:** *What is the society's view of the application of capital punishment in Texas?*



**MA:** Obviously, if people were against it they would've had the legislator repeal it. There always remains the philosophical question, whether the State has a moral right to be taking away life. On the other hand, some crimes are so serious that people do not want the culprit back in the society and they purport to send the message to others: this will happen to anyone who behaves in a certain way. Sometimes it's clear that the society is in the need of such a purifying experience which will restore its balance. No one gets condemned unless the crime level is really high and, usually, there is a lot of prior bad history to go with it.

**JS:** *What crimes are barred by capital punishment?*

**MA:** For instance, committing murder together with another felony, like robbery or rape. Also, killing a police officer might be punished in this way.

**JS:** *Is it true that capital punishment is comparatively often used in Texas?*

**MA:** I suppose it is. Texas has a sort of a frontier mentality, concentrated on people taking care of their business themselves. The State has also just passed a law that allows everyone to have a hand gun in their car as long as it is concealed, which certainly is not the case with all other states. This has lots to do with the theory that an armed society is a polite one and with the way of looking at the world, typical for the Western regions. If the bad guys are going to be armed than the good guys should be able to carry guns all the more. The other thing is that people in the woods and farming areas usually use guns for a variety of reasons, anyway. Just imagine, your wife or daughter is driving through the country and she gets a flat tire. You want her to be able to protect herself in case of some emergency, don't you?

**JS:** *Wikipedia provides us with some history of the capital punishment debate and controversy. The opponents maintain that the accused sometimes do not get proper defense and that lawyers are not always thoroughly prepared. Is it true that once a defending counsel fell asleep right in the middle of the trial, which might have led to the accused being sentenced to death?*

**MA:** We get questioned about that story over and over again. Now, here I am in Poland and, it's unbelievable, it happens to me again! It is true but it happened only this one time, in 1984. We've never had anything like that ever since.

**JS:** *I suppose it's just so utterly surprising to read about...*

**MA:** The sleeping guy's long dead by now and the case got remanded many times.

**JS:** *I read that afterwards it was said not to have influenced the case as the counsel didn't miss any vital parts of the trial.*

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**MA:** *(Laughter)* No, seriously, the quality of the defense is really high nowadays.

**JŚ:** *What do you think about the present structure of the US Supreme Court? Is it conservative or liberal?*

**MA:** In my opinion, they are center-right which, honestly, is the mirror of our society. But still, you may never be quite sure what the decisions are going to be like. The US people are often split fifty-fifty with regard to many important issues.

**JŚ:** *Do you have any favorite Justices?*

**MA:** I like Justice Scalia, Thomas and Roberts.

**JŚ:** *And the last question: do you like what you do?*

**MA:** I love the job! Every day, there happens something good, something funny. Step by step, you achieve success. I really enjoy going to work in the morning.

**JŚ:** *There's one lucky man.*